For instance, in Blackwood v. Cutting Packing Co.[2] said to be the same in principle, the contract was made before the crop had any existence except in the potentiality of the trees, being for fruit grown in subsequent years.

The case bears much similarity to that of Kinney v. Grogan.[3] In that case there was an executory contract for the purchase of olives not yet ripe, to be delivered by the vendor when ripe, payment to be made on delivery. The olives were frost-bitten before they ripened, and when delivered were of very poor quality. The contract was made forty-five days before the first delivery of the olives, yet the court held that the crop was in existence at the time of making the contract, and distinguished the Blackwood case on the ground already referred to. It was held that there was no implied warranty of merchantability. The olives were in a sense merchantable, being fit for the production of a low grade of olive oil, but the decision rests on the absence of warranty.

Since implied warranties are entirely a matter of Civil Code regulation[4] it might be well to note that there are only two sections[5] which have any application here. They provide that where the merchandise is not in existence at the time of the making of the contract, or, where it is inaccessible to the examination of the buyer, a warranty of the soundness and merchantability of the goods is implied. The second provision clearly has no application to the case in hand, where the grapes were inspected by the purchaser, unless it be held that the grapes contracted for were not the grapes upon which his eyes rested. And non-existence is the very gist of the other provision. Since there can be no other implied warranties, either the declaration of the case seems too broad, in view of the code limitations, or it involves narrow construction of the phrase "in existence at the time of the making of the contract." Can it be said that the grapes were not in existence when the vendee examined them, or that the ripened grapes were a different thing from the unripe grapes?

M. K. W.

Sales: Warranty of Food-Products: Damages.—Ever since 1625, when the buyer of a bezoar stone[1] contended that he had a right of action in case against the seller on account of the latter's affirmation that the stone was a bezoar stone, warranty in the sale of goods has occupied the border line between the field of tort and the field of contract. Although the action for breach of warranty is usually framed upon the theory that a warranty gives rise to a contractual

---

[2] (1888) 76 Cal. 212, 18 Pac. 248.

[3] (1911) 17 Cal. App. 527, 120 Pac. 433.

[4] California Civil Code, section 1764; Browning v. McNear, (1904) 145 Cal. 272, 78 Pac. 722.

[5] California Civil Code, sections 1768 and 1771.

[6] Williston on Sales, section 243.

[1] Chandelor v. Lopus, (1625) Reported in Croke, James, 4.

relation, nevertheless an action in tort may be brought to recover for breach of the warranty.[2] This tort action is framed on the idea of a deceit in inducing the purchaser to buy the goods relying on the warranty. It is sometimes necessary to elect between the tort and contract actions in order to meet particular situations. The cases involving implied warranties present many more difficult problems than do the cases involving express warranties although the remedies for the breach of either are usually the same.

The rule is that a sub-purchaser cannot recover against the original vendor for breach of warranty because there is no privity of contract.[3] When this rule was applied to the sale of food-products, it was found that to protect the manufacturer of such goods as against the consumer for injuries to the latter's health was allowing the manufacturer to disregard a legal duty. There was clearly no privity of contract when the consumer bought from a retailer and to avoid that objection the courts put the recovery not upon the breach of an implied covenant but "upon a violated or neglected duty voluntarily assumed."[4]

A recent case[5] has extended this doctrine to cover the situation where a sub-purchaser is a restaurant-keeper and suffers damage not by the consumption of the food but by loss of business because his patrons were injured by eating it. By the decision in this case the retailer is put in the position of a consumer, because his purpose in dealing with the goods is to serve consumers. The situation is compared by the court to the case of the sale of patent medicines where the manufacturer is held liable to the person using the medicine.[6]

The decision is rested on the rule that the manufacturer of food-products impliedly warrants that they are fit for food. This is particularly true where the goods are put in sealed cans and sold without the possibility of inspection. The court states its decision as follows: "Our holding is that, in the absence of express warranty of quality, a manufacturer of food-products under modern conditions impliedly warrants his goods when dispensed in original packages, and that such warranty is available to all who may be damaged by reason of their use in the legitimate channels of trade." That is clearly a rule of consequential damages for breach of a warranty, but it is submitted that as applied to the principal case it is not warranty used in the sense of a collateral promise or covenant, but rather as an expres-

---

[2] Shippen v. Bowen, (1887) 122 U. S. 575; Williston on Sales, sec. 197.

[3] Nelson v. Armour, (1905) 76 Ark. 352, 90 S. W. 288; Williston on Sales, Sec. 244.

[4] Tomlinson v. Armour Co., (1908) 75 N. J. L. 748, 70 Atl. 314, 19 L. R. A. (N. S.) 923; Ketterer v. Armour Co., (1912) 200 Fed 322; Thomas v. Winchester, (1852) 6 N. Y. 397, 57 Am. Dec. 455.

[5] Mazetti v. Armour Co., (Oct. 8, 1913) Wash. 135 Pac. 633.

[6] Thomas v. Winchester note 4 supra; Blood Balm Co. v. Cooper, 83 Ga. 457; 10 S. E. 118, 5 L. R. A. 612, 20 Am. St. Rep. 324; Meshbesher v. Channellene Oil Co., (1909) 107 Minn. 104, 119 N. W. 428.

sion of a legal duty, the only recovery for a breach of which would be a tort action. We entirely agree with the Court in its statement: "If there is no authority for the remedy, 'it is high time for such an authority'", quoting Ketterer v. Armour, supra. It would probably be clearer to hold the manufacturer upon a tort liability for a violated or neglected duty voluntarily assumed.[7]

M. C. L.

Statute of Frauds: Memorandum Signed by One Party: Mutuality. —The rule is drilled into students of the law that a fundamental requisite for a contract is mutuality; that unless both parties are bound, neither is bound. It comes therefore as a surprise later on to learn that in contracts coming under the statute of frauds the party signing the memorandum is bound, but not the other. It is explained that the statute affects the remedy, not the right; that the contract is voidable, not void—like the contract of an infant. But whether we regard the statute as merely a rule of evidence or as a rule of procedure,[1] the fact remains that the seventeenth section of the English statute provided that, "No contract for the sale of any goods . . . . shall be allowed to be good, except . . . . that some note or memorandum in writing of the said bargain, be made and signed by the parties to be charged by such contract." The language of the modern statutes and codes is equally emphatic, except that the word "parties" is usually changed to "party." Interpreting this change, however, as requiring only the signature of the party to be charged, the principle of mutuality is still violated. The Idaho Court, under a statute substantially like the California Code, decided a few months ago that a contract within the statute was unenforceable unless signed by both parties, resting the decision on the lack of mutuality.[2] In spite of a storm of dissent, the Idaho Court stands to its guns.[3] It is conceded that the cases are nearly all the other way,[4] but in a jurisdiction where the matter has not been decided, it is fairly arguable that the decision of the Idaho Court is in accord with the letter and spirit of the statute of frauds and with the principle of mutuality in contracts.

The developed Roman Law required no form or writing. In the mediaeval and feudal law there were at different times different ceremonies necessary for the creation of a contract, such as a symbolic pledge or the striking of the palm of the hand. As the law emerged from these artificial forms and from formal methods of proof, the principle of contract by simple agreement stood out undisguised; then there became apparent the danger of perjury. Accordingly in the sixteenth and seventeenth centuries we find various enactments re-

---

[7] Note 4, supra.

[1] Williston on Sales, sec. 113; 9 Am. L. Rev. 434.

[2] Houser v. Hobart, (1912) 22 Idaho 735, 127 Pac. 997, 43 L. R. A (N. S.) 410.

[3] Kerr v. Finch, (1913) 135 Pac. 1165.

[4] Note 43 L. R. A. (N. S.) 410; Easton v. Montgomery, (1891) 90 Cal. 307, 27 Pac. 280, 25 Am. St. Rep. 123.